BuzzFeed NEWS
111 E. 18th Street 13th Floor New York, NY 10003

June 18, 2018

Dan Vergano
Science Reporter
BuzzFeed News
1630 Connecticut Ave.
7th Floor
Washington, DC 20009
202-629-4563

June 18, 2018

FOIA Officer
Department of State
515 22nd Street, NW
Building SA-2
Washington, DC 20522-8100
(202) 261-8484

FOIA REQUEST

Fee benefit requested

Fee waiver requested

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of communications between State Department Bureau of Medical Services officials and University of Miami physician Michael E. Hoffe, MD, regarding injuries to US diplomats in Cuba. The request is for records made from October 30, 2016 to March 30, 2018, and includes any attached memos, white papers, and other documents. The State Department BMS personnel included in the request are the Medical Director (MED/DIR), Executive Director (MED/EX), Director Operational Medicine (MED/OM),

Group Exhibit A

BuzzFeed NEWS
111 E. 18th Street 13th Floor New York, NY 10003

Director Clinical Services (MED/C), Regional Medical Manager for Cuba, and/or anyone acting in those positions for the aforementioned time period.

I would like to receive the information in electronic format, preferably a machine-readable PDF or XML record.

I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed $10. However, please notify me prior to your incurring any expenses in excess of that amount.

As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Through this request, I am gathering information on the injuries suffered by US diplomats in Cuba that is of current interest to the public because of recent reports in new injuries in both China and Cuba. This information is being sought on behalf of BuzzFeed News for dissemination to the general public.

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities. .

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

I would appreciate your communicating with me by email or telephone, rather than by mail. My email is dan.vergano@buzzfeed.com and my phone is 202-629-4563.

I look forward to your determination regarding my request within 20 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Dan Vergano

United States Department of State

Washington, D.C. 20520

JUL 17 2018

Control Number: F-2018-04864

Dan Vergano
1630 Connecticut Ave.
7th Floor
Washington, DC 20009

Dear Mr. Vergano,

This letter is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated June 18, 2018, pursuant to FOIA 5 U.S.C. § 552 [552a], to the Department of State (DOS), in which requested communications between the Bureau of Medical Services and University of Miami physician Michael E. Hoffe, MD.

The Department of State, Office of Information Programs and Services (IPS) received your FOIA request on June 26, 2018. Your FOIA request was assigned the tracking number at the top of this letter. Please include the tracking number in all future communications concerning this FOIA request. In addition, we have placed your request in the complex category.

This Office has adopted a first in/first out practice of processing all incoming requests. Your request has been placed in chronological order based on the date of receipt and will be handled as quickly as possible. If you have any questions regarding the status of your request or to discuss any aspect of your request, you may contact our FOIA Requester Service Center or our FOIA Public Liaison via email at FOIAstatus@state.gov or by telephone at (202) 261-8484.

Sincerely,

Eric F. Stein, Director
Office of Information Programs and Services

United States Department of State

Washington, D.C. 20520

DEC 21 2018

Dan Vergano
1630 Connecticut Ave.
7th. Floor
Washington, DC. 20009

FOIA 2018-04864

Dear Mr. Vergano,

This is the initial agency decision on your 06-18-2018 FOIA request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to the Department of State (DOS), in which you requested access to copies of communications between State Department Bureau of Medical Services officials and University of Miami physician Michael E. Hoffer, MD, regarding injuries to U.S. diplomats in Cuba. The request is for records made from October 30, 2016 to March 30, 2018,- and.includes any attached memos, white papers, and other documents. The State Department BMS personnel included in the request are the Medical Director (MED'/DIR Executive Director (MED/EX), Director Operational Medicine (MED/OM), Director Clinical Services (MED/C), Regional Medical Manager for Cuba, and/or anyone acting in those positions for the aforementioned time period.

The Department of State, Office of Information Programs and Services (IPS) received your FOIA request on 06-26-2018. Your FOIA request was assigned the tracking number at the top of this letter. Please include the tracking number in all future communications concerning this FOIA request.

Please be advised that a search has been conducted in the Bureau of Medical Services (MED), and records were located that are responsive to your request.

After carefully reviewing the records responsive to your request, we have determined that the records are) exempt from disclosure pursuant to:

Exemptions

- 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of an individual's personal privacy.

- 5 U.S.C. § 552(b)(7)(A), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings.

For further assistance or to discuss any aspect of your request, you may contact our FOIA Requester Service Center or our FOIA Public Liaison at FOIAstatus@state.gov or by telephone at (202) 261-8484.

If you are not satisfied with DOS's determination in response to this request, you may administratively appeal by writing to: Appeals Officer, Appeals Review Panel, Office of Information Programs and Services (IPS), U.S. Department of State, State Annex 2 (SA-2), 515 22nd Street, NW, Washington, D.C. 20522-8100, or faxed to (202) 261-8571. Appeals must be postmarked within 90 calendar days of the date of this initial agency decision letter. Please include a copy of this letter with your written appeal and clearly state why you disagree with the determinations set forth in this response.

Additionally, if you are not satisfied with DOS's determination in response to your request, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA) to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email address: ogis@nara.gov; telephone: (202) 741-5770; toll free number: 1-877-684-6448; facsimile: (202) 741-5769.

Sincerely,

Eric F. Stein, Director
Office of Information Programs and Services

Matthew Schafer
Counsel
BuzzFeed, Inc.
111 E. 18th St., 14th Floor
New York, NY 10003

January 3, 2019

Appeals Officer, Appeals Review Panel
Office of Information Programs and Services (IPS)
U.S. Department of State, State Annex 2 (SA-2)
515 22nd Street, NW
Washington, DC 20522-8100

RE: APPEAL - FOIA Request 2018-04864

To Whom It May Concern,

My name is Matthew Schafer and I am counsel to BuzzFeed News and its reporter Dan Vergano. I write to appeal the State Department's ("Agency") denial, *see* Ex. A (the "Denial"), issued in response to Mr. Vergano's June 18, 2018 Freedom of Information Act ("FOIA") request seeking records relating to communications between Bureau of Medical Services officials and University of Miami physician Michael Hoffer, *see* Ex. B (the "Request").

BACKGROUND

The requested records relate to publication of a study of injuries claimed by U.S. diplomats in Cuba since 2016. Specifically, it sought certain records relating to communications with University of Miami physician Michael Hoffer. To Mr. Vergano's knowledge, Dr. Hoffer is not an officer or employee of the U.S. government. Dr. Hoffer has, however, recently published an article relating to injuries suffered by U.S. diplomats.[1] That paper included the following disclaimer: "The content and views expressed in this paper are those of the authors and do not represent the official views of the University of Miami, the University of Pittsburgh, the United States Department of State, the United States Department of Defense, or the United States Government."

The records sought are the subject of immense public interest because of the political repercussions of the claims, not least the removal of U.S. diplomats from Havana and expulsion of Cuban diplomats over the case, as well as the ongoing, international, dispute among medical experts over whether the injuries had any physical, biological, or psychological basis. Mr. Vergano has previously reported on these kinds of topics. For example, in December, Mr. Vergano reported on Dr. Hoffer publishing a study of the diplomats, with the data made public with the knowledge of the Agency. Mr. Vergano has written a half-dozen similar stories on the

[1] *See* https://onlinelibrary.wiley.com/doi/epdf/10.1002/lio2.231.

case in the last year.[2]

REQUEST

Based on the overwhelming public interest in this matter, on June 18, 2018, Mr. Vergano submitted a FOIA request for:

- copies of communications between State Department Bureau of Medical Services officials and University of Miami physician Michael E. Hoffe[r], MD, regarding injuries to US diplomats in Cuba.
- The request is for records made from October 30, 2016 to March 30, 2018, and includes any attached memos, white papers, and other documents.[3]

DENIAL

On December 21, 2018, the Agency issued its response to Mr. Vergano's request. According to the Denial, the Office of Information Program and Services decided that an unidentified number of responsive records were exempt from disclosure due to 5 U.S.C. § 552(b)(6) exemption for "clearly unwarranted" invasion of privacy and 5 U.S.C. § 552(b)(7)(A) law enforcement exemption. The Denial provided no detail as to why these Exemptions applied to the specific documents sought here

ARGUMENT

"FOIA was enacted to facilitate public access to Government documents and was designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *CREW v. DOJ*, 746 F.3d 1082, 1088 (D.C. Cir. 2014) (marks and citation omitted). So "[a]t all times, courts must bear in mind that FOIA mandates a 'strong presumption in favor of disclosure.'" *ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011) (citation omitted). "Because of FOIA's 'goal of broad disclosure,' the Supreme Court has 'insisted that the exemptions be 'given a narrow compass.'" *CREW*, 746 F.3d at 1088 (citation omitted); *see also FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed."). "FOIA's 'limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *CREW*, 746 F.3d at 1088 (citation omitted). It is the Agency's burden to "establish[] that a claimed exemption applies." *Id.*

The Denial here is improper because, without legitimate justification, it favors secrecy—not disclosure. Not only is withholding improper for the reasons discussed below, it is improper because the Denial does not apply the mandated presumption of openness as it fails to explain, as

[2] *See, e.g.*, https://www.buzzfeednews.com/article/danvergano/cuba-sonic-attack-ear-injuries, https://www.buzzfeednews.com/article/danvergano/china-diplomats-sonic-attacks, https://www.buzzfeednews.com/article/danvergano/cuban-diplomats-hearing.

[3] The original request contained a typo resulting in the omission of the "r" in Dr. Hoffer's surname. By e-mail correspondence dated December 17, 2018 to Eric F. Stein, Director, Office of Information Programs and Services, Mr. Vergano corrected this error and the Agency accepted that correction.

it must, whether disclosure would actually harm an interest protected by the Exemptions to FOIA. As such, the Denial should be reversed and the records promptly disclosed consistent with the letter and spirit of FOIA.

The Agency Has Not Met Its Burden Of Proving That It's
Search Was Reasonably Calculated To Uncover All Relevant Documents

Initially, the Denial was issued in error because it unreasonably limited Mr. Vergano's request without consultation with Mr. Vergano.

FOIA requests *must* be liberally construed. "If the agency can lightly avoid its responsibilities by laxity in identification or retrieval of desired materials, the majestic goals of [FOIA] will soon pass beyond reach." *Founding Ch. of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). An inadequate search amounts to an improper withholding because it is not "reasonably calculated to uncover all relevant documents" that must be disclosed to a requester. *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). In this case, the Denial should be reversed and the request remanded with directions to the Agency to conduct a proper search.

Whether a search is adequate is judged by a reasonableness standard. *Campbell v. United States*, 164 F.3d 20, 27 (D.C. Cir. 1999) (reasonableness should be applied "consistent with congressional intent tilting the scale in favor of disclosure" (internal citations omitted)). An agency must demonstrate "beyond material doubt" that its search was adequate. *Nation Magazine, Wash. Bureau v. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). Mere conclusory assertions do not suffice. *Toensing v. DOJ*, 890 F. Supp. 2d 121, 142 (D.D.C. 2012). Instead, an agency must "describe in . . . detail what records were searched, by whom, and through what process." *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (citation omitted). So the absence of bad faith alone will not does not establish an adequate search. *Krikorian v. Dep't of State*, 984 F.2d 461, 468 (D.C. Cir. 1993). Thus, where "a review of the record raises substantial doubt" about the adequacy of the search, a denial must be reversed. *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (citation omitted).

Here, Mr. Vergano requested "copies of communications between State Department Bureau of Medical Services officials and University of Miami physician Michael E. Hoffe[r], MD, regarding injuries to US diplomats in Cuba" and "any attached memos, white papers, and other documents." Yet, the Agency limited its search to "the Medical Director . . ., Director of Operational Medicine . . . , Director Clinical Services . . . , Regional Manager for Cuba, and/or anyone acting in those positions." No such limitation based on the positions identified in the Denial can be found anywhere in Mr. Vergano's Request, however. In other words, rather than construing Mr. Vergano's Request liberally, the Agency construed the Request narrowly. For that reason, whether or not withholding was proper as to the records the Agency *did* search for, the Denial must still be reversed for additional searches because it impermissibly and unilaterally revised Mr. Vergano's Request.

The Agency Has Not Met Its Burden Of Proving That The Documents Are Subject To Withholding Under Exemption 6

Exemption 6 does not apply here. Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). An agency must make two showings to withhold under Exemption 6: first it must determine whether information sought is "contained in personnel, medical, or 'similar' files," *Wash. Post Co. v. HHS*, 690 F.2d 252, 260 (D.C. Cir. 1982), and then it must determine whether "disclosure would constitute 'a clearly unwarranted invasion of personal privacy,'" *id.* The Agency, as with all Exemptions, bears the burden of showing that Exemption 6 applies. *Dep't of State v. Ray*, 502 U.S. 164, 172 (1991). And, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Wash. Post Co.*, 690 F.2d at 261.

1. The withheld records are not "personnel and medical files," or other similar files

Exemption 6 does not apply here because the records are not "personnel and medical files and other similar files." While this phrase has been broadly interpreted, it still has its limits. As one court explained, "While 'similar files' must be construed broadly, it must not become devoid of meaning altogether." *Brown v. FBI*, 873 F.Supp.2d 388, 401 (D.D.C. 2012); *see also id.* (noting that personal information includes "place of birth, date of birth, date of marriage, employment history, and comparable data").

Correspondence with government employees like that at issue here are regularly held not to be covered by Exemption 6. *Aguirre v. SEC*, 551 F. Supp. 2d 33, 54 (D.D.C. 2008) ("Correspondence does not become personal solely because it identifies government employees."); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (names and work telephone numbers of DOJ paralegals are not "personal" information); *Gordon v. FBI*, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (agency employee names are not personal information about employees). As multiple district courts have explained, correspondence is not "subject to redaction under Exemption 6 'solely because it identifies government employees.'" *Friedman v. Secret Serv.*, 923 F.Supp.2d 262, 282 (D.D.C. 2013) (listing cases); *Families for Freedom v. CPB*, 837 F.Supp.2d 287, 300 (S.D.N.Y.2011) ("mundane interoffice communications that do not contain any detailed personal information" are not "similar files"). Thus, Exemption 6 cannot prevent disclosure of any records here that are not personnel and medical files.

2. The public interest in disclosure outweighs the privacy interest

Under Exemption 6, an agency must decide first "if disclosure would constitute an invasion of privacy, and how severe an invasion." *Rural Hous. All. v. Dep't of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974). Then, it must determine whether that privacy interest is outweighed by the countervailing public interest in disclosure.

2.1. The personal privacy interest is *de minimis*

Not all personal privacy interests count for the purposes of Exemption 6. As an initial matter, the agency must show a real privacy interest at risk—not just a feared one. "[M]ere speculation" of an invasion of privacy "is not itself part of the invasion of privacy contemplated by Exemption 6." *Nat'l Ass'n of Retired Fed. Empl. v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989). Further, there must "be a causal relationship between the disclosure and the threatened invasion of privacy." *Id.*

Here, it is entirely unclear what possibly could be the personal privacy interest under threat. Indeed, it appears--although it goes unstated--that the privacy interest is one held by Dr. Hoffer. But Dr. Hoffer has already been publicly identified doing this kind of work and has published the results of that work. It is unclear what communications Dr. Hoffer may have had with Agency personnel that could someone intrude upon a valid privacy interest held by Dr. Hoffer or the other authors of the paper.

As to any privacy interest of government employees, "Because [E]xemption 6 seeks to protect government employees from unwarranted invasions of privacy, it makes sense that FOIA should protect an employee's personal information, *but not information related to job function*." *Cowdery, Ecker & Murphy, LLC v. Dep't of Interior*, 511 F. Supp. 2d 215, 219 (D. Conn. 2007). Because the Request seeks no personal information of government employees, there is a lack of a privacy interest in this regard as well.

2.2. The public interest in disclosure is overwhelming

The public interest in this case speaks for itself. For the purposes of Exemption 6, the public interest at issue is that embodied by FOIA's "core purpose" of "shed[ding] light on an agency's performance of its statutory duties." *DOJ v. Reporters Comm.*, 489 U.S. 749, 773-76 (1989). In determining the extent of the public interest, agencies should also consider the amount of media attention an issue has received, and more generally whether an issue is the subject of public debate or government action. Here, records disclosing how the Agency responded to the events in Cuba, including how it interacted with independent medical researchers, would shed light on its performance. Moreover, there can be no doubt that the events in Cuba are the subject of massive amounts of public attention. Under these circumstances, public interest in disclosure is strong. *See ACLU v. DOJ*, 655 F.3d 1, 12-13 (D.C. Cir. 2011).

Additionally, disclosure will advance this interest. Disclosure of documents detailing government malfeasance and incompetence is, of course, likely to advance the significant public interest in knowing what the government is up to. *Stern v. FBI*, 737 F.2d 84, 93-94 (D.C. Cir. 1984); *see also Perlman v. DOJ*, 312 F.3d 100, 107-09 (2d Cir. 2002) (ordering release of documents relating to investigation of INS general counsel implicated in wrongdoing). But the advancement of the public interest inquiry is not limited to wrongdoing. Indeed, nothing in FOIA is solely focused on uncovering misconduct. *See, e.g.*, *Judicial Watch, Inc. v. Secret Serv.*, 579 F. Supp. 2d 151, 154 (D.D.C. 2008) (disclosure of visitor "names would shed light on why the visitor came to the White House"); *see also Cooper Cameron Corp. v. Dep't of Labor*, 280

F.3d 539, 549 (5th Cir. 2002) (holding that "no showing of agency irregularity or illegality" by the agency is required to show a public interest in disclosure). Thus, misconduct or not, the public interest is great here and disclosure of the records sought will advance that interest.

2.3. The public interest significantly outweighs the privacy interest

"Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." *Dep't of Air Force v. Rose*, 425 U.S. 352, 381 n. 19 (1976). Thus, Exemption 6's language creates "a balance tilted emphatically in favor of disclosure." *Stern v. FBI*, 737 F.2d 84, 91 (D.C. Cir. 1984). As an initial matter, because there is no more than a *de minimis* privacy interest at issue here, there is no need to conduct a balancing test and the records should be disclosed. *ACLU v. DOD*, 543 F.3d 59, 87 (2d Cir. 2008) ("we are not compelled to balance interests where there is no more than a de minimis privacy interest at stake.").

But even if there were, the public interest here vastly outweighs it. *Roth v. DOJ*, 642 F.3d 1161, 1181 (D.C. Cir. 2011) (public interest in knowing whether federal government withheld information corroborating an inmate's innocence outweighed privacy interests of men potentially linked to murders); *ACLU v. DOJ*, 655 F.3d 1, 16 (D.C. Cir. 2011) (public interest in disclosure of prosecutions where defendants were subject to warrantless cell phone tracking outweighed privacy interest); *EFF v. DNI*, 639 F.3d 876, 887 (9th Cir. 2010) (public interest in disclosure of corporate lobbyists clearly outweighed privacy interests). As with all these cases, the public interest here outweighs the private interest in nondisclosure.

The Agency Has Not Satisfied
The Threshold Test for Exemption 7

The Agency purports to invoke Exemption 7(A). Exemption 7 applies only to "law enforcement records." To determine whether the withheld records satisfy Exemption 7's threshold requirement, two showings must be made: First, an agency "must establish a rational 'nexus between the investigation and one of the agency's law enforcement duties,'" and, second, "a connection between an 'individual or incident and a possible security risk or violation of federal law.'" *Campbell v. DOJ*, 164 F. 3d 20, 32 (D.C. Cir. 1998). For one of the subparts of Exemption 7 to apply, an agency must make this showing "'before . . . withhold[ing] requested documents on the basis of any of [Exemption 7's] subparts.'" *Maydack v. DOJ*, 254 F. Supp. 2d 23, 38 (D.D.C. 2003). This showing must be made on *facts* rather than mere *conclusions*. *Quinon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996) (rejecting Exemption 7 claim by FBI where it "simply allude[d] to 'certain events,' which [FBI] fail[ed] to describe or characterize").

The focus, then, "is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. DOJ*, 284 F.3d 172, 176-77 (D.C. Cir. 2002); *see also Whitson v. Forest Serv.*, No. 16-cv-01090 (D. Colo. May 23, 2017) (distinguishing traditional law enforcement agencies from non-law enforcement agencies); *Benavides v. BOP*, 774 F.Supp.2d 141 (D.D.C. 2011) (telephone billing records from prison not compiled for law enforcement purposes); *Grandison v. DOJ*, 600 F.Supp.2d 103, 113 (D.D.C. 2009) (deposition transcripts in

civil tort case were not "compiled for law enforcement purposes"); *Cawthon v. DOJ*, No. 05-0567, 2006 WL 581250, at *4 (D.D.C. Mar. 9, 2006) (malpractice records for BOP doctors were not compiled for law enforcement); *Phillips v. ICE*, 385 F.Supp.2d 296, 306 (S.D.N.Y. 2005) (report involving immigration status of former military officials accused of atrocities not a law enforcement record when prepared for Congress).

Here, the Agency has not even attempted to demonstrate that the records let alone *all* of the records--many of which are no doubt communications with Dr. Hoffer, an independent medical professional conducting private research--were compiled for law enforcement purposes. Simply, we are left with nothing more than "trust us" boilerplate, the likes of which courts regularly reject. *Coleman v. Lappin*, 535 F.Supp.2d 96, 98 (D.D.C. 2008) ("vague and general references" to BOP Program Statement do not establish law enforcement purpose); *Cotton v. Adams*, 798 F.Supp. 22, 25 (D.D.C. 1992) (stating that courts cannot infer law enforcement purpose). For this reason, the Denial cannot be upheld on the basis of any subsection of Exemption 7 and it must, therefore, be reversed.

The Agency Has Not Met Its Burden Of Proving That The Documents Are Subject To Withholding Under Exemption 7(A)

Exemption 7(A) does not apply here. Exemption 7(A) permits withholding only of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Those proceedings must be "pending or reasonably anticipated." *Durrani v. DOJ*, 607 F.Supp.2d 77, 89 (D.D.C. 2009); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). This requirement prevents the Exemption from "endlessly protect[ing] material simply because it was in an investigatory file." *Id.* at 230; *see also North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) ("Exemption 7(A) does not authorize automatic or wholesale withholding of records or information simply because the material is related to an enforcement proceeding.").

1. The Agency has not shown the requisite interference

Exemption 7 also does not apply because the Agency has not shown the requisite interference to sustain withholding. At the outset, not all disclosures that relate to an investigation necessarily interfere with an investigation. *Goodrich Corp. v. EPA*, 593 F.Supp.2d 184, 193 (D.D.C. 2009) ("conclusion that a civil litigation (or discovery) advantage potentially realized by the production of a document is enough to warrant protection under Exemption 7(A)"); *see also Alyeska Pipeline Service Co. v. EPA*, 856 F.2d 309, 312 (D.C. Cir. 1988) (noting that justification for withholding under Exemption 7(A) is at its apex where party seeking material is the "actual or potential target" of the investigation). Rather, "the government must show that disclosure of those documents would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding." *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989).

Moreover, not all alleged interferences are described with sufficient detail to support withholding. As the D.C. Circuit explained, an agency must provide "specific information about

the impact of the disclosures." *Sussman v. U.S. Marshalls*, 494 F.3d 1106, 1114 (D.C. Cir. 2007); *see also Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (holding that agency must make specific showing why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *ACLU v. DOJ*, 833 F. Supp. 399, 407 (S.D.N.Y. 1993) (holding that an agency "must supply sufficient facts about the alleged interference"). An agency's withholding, in other words, must "carefully explain[] . . . how the release . . . would 'interfere' with enforcement proceedings." *Miller*, 13 F.3d at 263 (citation omitted).

Here, the Agency neither explained what the alleged interference is nor did it provide any information at all supporting its conclusion that the release of records relating to a public, independent research study would interfere with a law enforcement proceeding. Nor could it. The disclosure of the records cannot possibly interfere with the investigation in a way intended to be protected by the statute. *See Alyeska Pipeline Service Co.*, 856 F.2d at 312. Indeed, the results of the Dr. Hoffer's research are available online for the whole world to see. It is entirely unclear how the records sought here, which relate to the same topic of discussion of Dr. Hoffer's paper, would then interfere with the government's investigation into what happened in Cuba. In fact, the Agency reviewed Dr. Hoffer's article for publication and greenlit its publication further undercutting any suggestion that the release of *all* the records sought here somehow would interview with an ongoing investigation.[4] For this reason too, the Denial must be reversed.

The Agency Has Not Met Its Burden Of Proving That Release Of The Documents Sought Or Some Portion Thereof Will Likely Cause Harm

1. The Agency has not considered whether disclosure would harm an interest protected by the Exemption

The Agency has not complied with FOIA as amended by Congress in 2016. Even if a responsive record qualifies for withholding under an exemption, the amendment creates a presumption, directing that an agency shall withhold record "*only if* the agency reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8) (emphasis added). Where an agency cannot make such a showing, the withheld information must be disclosed. *See, e.g.*, *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, No. 16-cv-05254 (N.D. Cal. Nov. 30, 2017) ("Absent a showing of foreseeable harm to an interest protected by the [exemptions], the documents must be disclosed."); *see also Rosenberg v. DOD*, No. 17-CV-00437, 2018 WL 4637363 (D.D.C. Sept. 27, 2018) ("To satisfy the "foreseeable harm" standard, DOD must explain how a particular Exemption 5 withholding would harm the agency's deliberative process."); *Bergeron v. DOJ*, No. 13-cv-00625 at 6 (slip op) (D. Nev. Jun. 25, 2015) (ordering disclosure of redacted material in email because the DOJ failed to "establish that disclosure of the document would foreseeably harm the agency's decision-making process by revealing the mental processes of decision-makers" (construing the 2016 amendment's executive order predecessor)).

Here, there is no evidence at all that the Agency even considered whether "the disclosure would

[4] *See* https://www.buzzfeednews.com/article/danvergano/cuba-sonic-attack-ear-injuries.

harm an interest protected" by FOIA, requiring reversal of the Denial on these grounds alone. 5 U.S.C. § 552(a)(8). This is especially so where Dr. Hoffer's research and the conclusions resulting from it are already available to the public with, apparently, the consent of the Agency.

2. The Agency failed to determine whether non-exempt segregable information could be disclosed

Even if some information in a responsive record is exempt from disclosure and will not cause harm to an interest protected by the Exemption, FOIA requires the agency to disclose any non-exempt portions of records that may otherwise be withheld. 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."). Indeed, "the focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Cent., Inc. v. Dept. of Air Force*, 566 F. 2d 242 (D.C. Cir. 1981). As such, "[i]t has long been a rule . . . that nonexempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Trans-Pacific Policing Agreement v. Customs Serv.,* 177 F.3d 1022, 1027 (D.C. Cir. 1999). To satisfy this requirement, an agency must provide a "detailed justification" for why non-exempt information within individual responsive records cannot be disclosed. *Mead Data Cent., Inc.*, 556 F.2d at 260 (rejecting agency's reliance on "sweeping, generalized claims of exemption for documents").

Although this process may be burdensome and costly to an agency, there is an easy solution offered up by the D.C. Circuit: forego this arduous task and "disclose exempt material for which there is no compelling reason for withholding" along with the non-exempt material. *Id.* at 261. An agency may only *not* segregate where it can make a showing that the result of that process "would be an essentially meaningless set of words and phrases." *Id.* This is a high bar. *Stolt–Nielsen Transp. Grp. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (rejecting argument that redacted documents could be withheld because they "would provide no meaningful information"); *EPIC v. DHS*, 926 F.Supp.2d 311, 316 (D.D.C. 2013) (rejecting outsized reliance on "a footnote in *Mead Data*" often invoked by agencies in an attempt to skirt obligations under FOIA (citing *Mead Data Cent., Inc.*, 556 F.2d at 261 n.55)).

Here, the Agency has failed to undertake the required segregability analysis. In point of fact, the Agency does not even state whether it made such an analysis or not. This is wholly improper. While the easy out here may be wholesale withholding, that out is not a permissible one under FOIA. For this reason, the Denial should be vacated and remanded for the Agency to undertake the statutorily mandated segregability analysis and disclose whatever non-exempt information can be disclosed.

* * *

For the foregoing reasons, the Agency's decision should be reversed and the Request should be granted in full. To the extent that it is affirmed, in whole or in part, please provide a detailed explanation for that decision. Because this information is on a matter of great public interest, we

request expedited treatment of this Appeal. In any event, we trust that we will receive your decision within 20 business days as required by 5 U.S.C § 552(a)(6)(A)(ii).

Thank you for your prompt attention to this matter. Please feel free to reach out to me at any time.

Sincerely,

Matthew L. Schafer

United States Department of State
Washington, D.C. 20520

February 7, 2019

Case No. F-2018-04864
Segment: MED

Mr. Dan Vergano
1630 Connecticut Avenue, 7th Floor
Washington, DC 20009

Dear Mr. Vergano:

This is to inform you that the Chairman of the Department's Appeals Review Panel has received your letter of January 3, 2019, appealing the above Freedom of Information case.

Should you have any questions concerning the status of your appeal, please write to:

The Appeals Officer
A/GIS/IPS/PP/LA
SA-2, Room 8100
U.S. Department of State
Washington, DC 20522-8100

Sincerely,

Lori Hartmann
Appeals Officer
Office of Information Programs
and Services

BuzzFeed NEWS
111 E. 18th Street 13th Floor New York, NY 10003

March 26, 2019

Dan Vergano
BuzzFeed News
1630 Conn. Ave, Suite 700
Washington, DC 20009

TO: Lori Hartman
A/GIS/IPS/PP/LA
SA-2, Room 8100
U.S. Department of State
Washington, DC 20522-8100

Ms. Hartman,

I'm writing to inquire about the status of the appeal of FOIA F-2018-04864, which you last contacted me about in a letter dated Feb. 7, 2019 and postmarked Feb. 22, 2019. As you are aware, 5 U.S.C. § 552(a)(7) states, in pertinent part, "Each agency shall … provide[ ] information about the status of a request to the person making the request … , including … an estimated date on which the agency will complete action on the request."

Pursuant to this statute, I hereby request that the U.S. State Department provide me with a written estimated date on which the agency will complete action on this FOIA request. Please be aware that stating the request's place in your queue will not satisfy the statutory burden. Nor will stating that the agency has a backlog of requests and thus cannot provide an estimated date of completion. Instead, only "an estimated date on which the agency will complete action on the request" will satisfy the agency's statutory responsibility.

Thank you for your time,

Dan Vergano
BuzzFeed News
202-629-4563

CC: BuzzFeed News Legal Department / FOIA Committee

United States Department of State

Washington, D.C. 20520

April 23, 2019

Dan Vergano
BuzzFeed News
1630 Connecticut Avenue, NW
Suite 700
Washington, DC 20009

Dear Mr. Vergano:

Thank you for your letter of March 26, 2019, inquiring about the status of your appeal in case number F-2018-04864. The Department of State has a large number of Freedom of Information Act and Privacy Act requests pending. Your appeal will be processed in turn. The estimated completion date is September 2019.

Federal regulations provide that a requester shall be deemed to have exhausted his/her administrative remedies if an agency fails to respond to an appeal within the twenty-day time period, and the requester may then immediately seek judicial review. Thus, since the twenty-day period has elapsed, you are free to seek judicial review should you wish to do so.

Sincerely,

Lori Hartmann